91-958

In The

Supreme Court of the United States

October Term, 1991

STAY, INC.,

Petitioner,

v.

RICHARD B. CHENEY, ET AL,

Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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December 3, 1991

QUESTIONS PRESENTED

31 U.S.C. § 9306 requires that corporate sureties appoint resident agents by written power of attorney with the United States District Court in three separate judicial districts in order to furnish a bond to the United States. In this case, the United States accepted a bid bond even though the corporate surety had not complied with this statute.

The questions presented are:

1) Whether compliance with 31 U.S.C. § 9306 is a condition precedent to providing a bid bond to the United States?

2) Whether the Court of Appeals erred in adopting an agency interpretation of 31 U.S.C. § 9306 contrary to the plain meaning of the statute?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner Stay, Inc. and the respondents Richard B. Cheney, the Secretary of Defense, Karen A. Lefman, the Contracting Officer, and American Mutual Protective Bureau.

Petitioner Stay, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

Table of Contents

Table of Citations

Cases **Page**

Statutes

Regulations

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The petitioner Stay, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 4, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 940 F.2d 1457, and is reprinted in the Appendix hereto, p. 1A, *infra*.

The memorandum decision of the United States District Court for the Middle District of Florida (Moore, J.) has not been reported. It is reprinted in the Appendix at p.12A, *infra*.

The decision of the General Accounting Office, upon which the Department of Defense relied, is reported at 69 Comp. Gen. 251 and 90-1 CPD ¶ 225, and is reprinted in the Appendix at p.20A, *infra*.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. § 9306 provides:

§ 9306. Surety corporations acting outside area of incorporation and place of principal office

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[1] The Competition in Contracting Act, 31 U.S.C. § 3556 provides that in a bid protest lawsuit, the decision of the Comptroller General "shall be considered to be part of the agency record subject to review."

(a) A surety corporation may provide a surety bond under section 9304 of this title in a judicial district outside the State, the District of Columbia, or a territory or possession of the United States under whose laws it was incorporated and in which its principal office is located only if the corporation designates a person by written power of attorney to be the resident agent of the corporation for that district. The designated person --

(1) may appear for the surety corporation;

(2) may receive service of process for the corporation;

(3) must reside in the jurisdiction of the district court for the district in which a surety bond is to be provided; and

(4) must be a domiciliary of the State, the District of Columbia, territory, or possession in which the court sits.

(b) The surety corporation shall file a certified copy of the power of attorney with the clerk of the district court for the district in which a surety bond is to be given at each place the court sits. A copy of the power of attorney may be used as evidence in a civil action under section 9307 of this title.

The Federal Acquisition Regulations, 48 C.F.R. Ch. 1 § 28.101-4, provide:

28.101-4 Noncompliance with bid guarantee requirements.

Noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the following situations when the noncompliance shall be waived, unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest:

(a) Only one bid is received. In this case, the contracting officer may require the furnishing of the bid guarantee before award.

(b) The amount of the bid guarantee submitted is less than required but is equal to or greater than the difference between the bid price and the next higher acceptable bid.

(c) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity bid upon, is sufficient or a quantity for which the bidder is otherwise eligible for award. Any award to the bidder shall not exceed the quantity covered by the bid guarantee.

(d) The bid guarantee is received late, and late receipt is waived under 14.304.

(e) The bid guarantee becomes inadequate as a result of the correction of a mistake under 14.406 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid).

(f) A telegraphic bid modification is received without corresponding modification of the bid guarantee, if the modification expressly refers to the previous bid and the bidder corrects any deficiency in the bid guarantee.

(g) When an otherwise acceptable bid bond was submitted with a signed bid, but the bid bond was not signed by the offeror.

(h) When an otherwise acceptable bid bond is erroneously dated or bears no date at all.

(i) When a bid bond does not list the United States as obligee, but correctly identifies the offeror, the solicitation number and the name and location of the project involved, so long as it is acceptable in all other respects.

The Armed Services Procurement Act, 10 U.S.C. § 2305(b)(3), provides:

> Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a

contract shall be made by transmitting written notice of the award to the successful bidder.

The Administrative Procedure Act provides:

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . .

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

JURISDICTION BELOW

Petitioner's Complaint in District Court invoked jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The APA provides that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C § 702.

The Eleventh Circuit has held that this statute, in combination with an alleged agency violation of another federal statute, is sufficient to confer subject matter jurisdiction upon a District Court. *Choctaw Manufacturing Co., Inc. v. United States*, 761 F.2d 609, 615 (11th Cir. 1985). Plaintiff's Complaint alleges a violation of the Armed Services Procurement Act ("ASPA"), 10 U.S.C. § 2305(b)(3). Under this statute, the Contracting Officer can only award to a bidder "whose bid conforms to the solicitation." The Petitioner Stay, Inc. ("Stay") alleged that the Department of Defense awarded a contract to a bidder whose bid did not conform to the solicitation in violation of 10 U.S.C. § 2305. Stay also alleged a violation of 31 U.S.C. § 9306 by the contracting officer in accepting a bond from a surety corporation which had not complied with the provisions of this statute.

The District Court's exercise of bid protest jurisdiction was also consistent with the Competition in Contracting Act, 31 U.S.C. §§ 3551-3556. Specifically, 31 U.S.C. § 3556 recognizes "the right of any interested party to file a [bid] protest with the contracting agency or to file

an action in a district court of the United States or the United States Claims Court. (emphasis added)." An "interested party" is defined in 31 U.S.C. § 3551 as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."

Stay invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Course of Proceedings

This is a bid protest case filed by Plaintiff, Stay, Inc. ("Stay"), a disappointed bidder for a contract with the United States Department of Defense for the provision of security guard services at the Army Material Command Building in Alexandria, Virginia. Stay filed a verified complaint for declaratory and injunctive relief on February 27, 1990. Simultaneously, Stay filed a motion for temporary restraining order and preliminary injunction. On February 28, 1990, the District Court entered a Temporary Restraining Order enjoining the defendants from implementing the contract, which had been awarded to American Mutual Protective Bureau ("AMPB"). The Temporary Restraining Order took effect upon the posting by Stay of a $100,000 cash bond. The Court also set a hearing on Stay's motion for a preliminary injunction for March 9, 1990.

At the hearing on March 9, 1990, the District Court granted the motion of AMPB to intervene as a defendant.

The Court also denied Stay's request for preliminary injunction based on a failure to demonstrate a substantial likelihood of success on the merits. On July 13, 1990, the District Court granted Summary Judgment in favor of the Defendants and AMPB. The July 13, 1990 Order also provided that any claim for damages on the bond be filed within 20 days. AMPB filed a claim for damages against the bond, which was denied by the District Court on September 10, 1990.

Stay filed a notice of appeal with the District Court on September 11, 1990. After oral argument, the Court of Appeals for the Eleventh Circuit affirmed the District Court opinion on September 4, 1991.

B. Statement of the Facts

This dispute arises out of invitation for bids MDA946-89-C-0041 (the "IFB") issued on May 18, 1989 by the Department of Defense Washington Headquarters Services' Procurement and Contract Office. The IFB was a small business set aside which required the furnishing of security guard services at the AMC Building in Alexandria, Virginia.

The IFB required all bidders to submit a bid guarantee with their bids in the amount of 20% of the bid price for the initial 12-month period of the contract. The IFB further required that the bid guarantee be submitted on SF24, the standard form to be used whenever a bid guarantee is required in connection with the furnishing of supplies or services to the United States Government. This

form, contained at pages L-11 and L-12 of the IFB, provides that:

> 4.(a) Corporations executing the bond as sureties must be among those appearing on the Treasury Department's list of approved sureties and must be acting within the limitations set forth therein.

The limitations in the Treasury Circular include the requirement that surety corporations appoint federal agents for service of process in accordance with 31 U.S.C. § 9306.

Bids were opened on June 20, 1989, in the Pentagon Building in Virginia, with seven firms submitting offers. The apparent low bidder was H & H Service Corporation ("H & H"); the apparent second low bidder was AMPB; and the apparent third low bidder was Plaintiff. Plaintiff filed an agency level protest protesting the award of the contract to either H & H or AMPB on the basis that neither company had provided a valid bid bond. After apparently investigating the bid bonds of both H & H and AMPB, the Contracting Officer decided to reject the bid of H & H as non-responsive. The Contracting Officer, however, found that AMPB's bid bond was acceptable.

After receiving notification that the Army intended to accept AMPB's bid bond, the Plaintiff filed a Bid Protest with the GAO. AMPB's bid bond was provided by a corporate surety, Merchants Bonding Company. Although the contract was to be performed in Virginia and the bid opening took place in Virginia, Merchants Bonding Company is not licensed to do business in Virginia. The Plaintiff's protest with the GAO alleged that it was improper for the government to accept a bid bond from a

surety not licensed to do business in the place of performance. The GAO denied Plaintiff's protest on December 22, 1989.

After the GAO denied Plaintiff's protest, Plaintiff discovered that Merchants Bonding Company had not appointed resident agents by written Power of Attorney as required by 31 U.S.C. § 9306 and the IFB. This statute requires surety companies to appoint Federal Process Agents in the following districts: "Where the principal resides; where the obligation is to be performed; and in the District of Columbia where the bond is returnable or filed." *See* Treasury Circular 570 note (d), 53 Fed. Reg. 25,052 (1988) and 31 U.S.C. § 9307(a)(2)(A)-(D). The requirement to appoint agents for service of process in the Treasury list is drawn from 31 U.S.C. § 9306. The language of this statute is mandatory and allows a corporate surety to provide a bond outside its state of incorporation "only if" it has designated the appropriate agents. Federal Regulations, 31 CFR § 224, also require the appointment of these process agents.

It is undisputed that AMPB's surety did not appoint Federal Process Agents as required by the IFB, statute and regulation. Merchants Bonding Company did not file a certified copy of a written power of attorney appointing a resident agent with the Clerk of the District Court for the Eastern District of Virginia (the district in which the contract was to be performed) prior to AMPB submitting its bid. Merchants Bonding Company also failed to file a certified copy of a written power of attorney appointing a resident agent with the Clerk of the United States District Court for the Northern District of California (the district in which the principal, AMPB, resides) prior to AMPB

submitting its bid. Agents were not appointed in these districts until after Stay filed its protest with the GAO.

The Clerk of the District Court for the District of Columbia, the third jurisdiction required by statute, indicated that Merchant's Bonding Company had appointed Michael J. Shea as agent for service. A letter to Mr. Shea, however, was returned to sender marked "F.O.E." (forwarding order expired).[2]

Stay believed that Merchants Bonding Company's failure to appoint resident agents was not only a violation of statute, but also a violation of Treasury Department regulations and the terms of the solicitation. Because AMPB's bid bond surety was not authorized to issue bonds to the United States, AMPB's bid was totally defective and non-responsive. On the basis of these new facts, Plaintiff filed a Request for Reconsideration with the GAO on January 19, 1990. By decision dated February 26, 1990, the General Accounting Office denied Stay's Request for Reconsideration. The GAO held that the failure of AMPB's bid bond surety to comply with 31 U.S.C. § 9306 was "a procedural omission that does not render the bid bond defective." See Appendix at p. 25A. The next day, February 27, 1990, Stay filed the District Court action seeking declaratory and injunctive relief.

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[2] AMPB contends that it appointed another agent in the District of Columbia in 1988. AMPB presented no evidence, however, that this appointment was properly filed with the District Court as required by 31 U.S.C. § 9306. (R1-1-Ex.Q)

REASONS FOR GRANTING THE WRIT

The disposition of this case below hinged on whether Respondent American Mutual Protective Bureau ("AMPB") provided a valid bid bond. AMPB's bid bond surety did not appoint federal agents for service of process as required by 31 U.S.C. § 9306. The General Accounting Office ("GAO") found that this was a mere "procedural omission" which could be waived by the contracting officer. The Department of Defense adopted the GAO decision and allowed AMPB to begin contract performance. Even though this agency decision is contrary to the plain requirements of 31 U.S.C. § 9306, the Eleventh Circuit simply "rubber stamped" the GAO decision without any independent analysis of the requirements of the statute. In so doing, the court failed to satisfy its duty to responsibly review the agency action.[3]

This Court has given clear guidance on the appropriate judicial review of an agency interpretation of a statute:

> When we interpret a statute construed by the administering agency, we ask first "whether Congress has directly spoken to the precise question at issue. If the interest of Congress is

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[3] The Administrative Procedure Act, 5 U.S.C. § 706, entitled "Scope of Review," provides that the "reviewing court shall decide all questions of law, interpret constitutional and statutory provisions . . . [and] shall -- . . . hold unlawful and set aside agency action, findings and conclusions found to be -- . . . (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." The Eleventh Circuit completely abdicated its responsibility to interpret § 9306 under the APA. See *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 915 (3rd Cir. 1981) ("[b]lind acceptance of agency 'expertise' is not consistent with responsible review").

> clear, that is the end of the matter; . . . [but] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Mead Corporation v. Tilley, 490 U.S. 741, 722, 104 L. Ed.2d 796, 805, 109 S.Ct. 2156, –(1989) citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 81 L. Ed.2d 694, 104 S.Ct. 2778 (1984). When the terms of a statute are unambiguous, "judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. –, 112 L. Ed.2d 608, 616, 111 S.Ct. – (1991) (citations omitted). The reasonableness of the agency interpretation is only relevant if the statute is ambiguous.[4]

The Eleventh Circuit completely disregarded this analytical framework in affirming the agency interpretation of 31 U.S.C. § 9306. The court made no finding that the provisions of this statute were ambiguous or unclear. The court based its decision solely on the reasonableness of the agency decision.

It was improper to defer to the agency decision because the statute is not ambiguous in the least. Section 9306(a) provides that a surety corporation may provide a bond outside the state of its incorporation "only if" the corporation designates the appropriate registered agents for service of process. Similarly, 31 U.S.C. § 9304(a)

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[4] In the context of the APA, the District Court for the District of Columbia has similarly stated that the "rationality of an agency's action . . . is relevant only if it did not violate applicable regulations or statutes." *Abel Converting, Inc. v. United States*, 679 F.Supp. 1133, 1139 n.8 (D.D.C. 1988).

provides that: "When a law of the United States Government requires or permits a person to give a surety bond through a surety, the person satisfies the law if the surety bond is provided for the person by a corporation . . . (3) complying with sections 9305 and 9306 of this title."

Furthermore, Section 9306(b) provides that the surety corporation "shall file" a certified copy of the power of attorney with the District Court for the district in which a surety bond "is to be given." Once again, Congress has unambiguously spoken. The words "shall file" are mandatory and the words "is to be given" clearly mandate that the power of attorney be filed prior to the giving of the bond.[5] It would have been difficult for Congress to have been any clearer. Congress intended that corporate sureties could provide bid bonds to the United States "only if" they complied with this statute.[6] A surety corporation

[5] The mandatory nature of this statute is also reinforced by referring to its predecessor statute, 6 U.S.C. §§ 6-13 (1974). This statute provided that "no such company shall do business" until it appoints the required Federal process Agents. 6 U.S.C. §§ 6-13 were repealed, reworded for clarity, and recodified at 31 U.S.C. §§ 9301-9307. At the time of this recodification, the Congressional history indicates that no substantive change to the statute was intended by the rewording and recodification. See H. Rep. No. 97-651, 128 Cong. Rec.5452, 1982 U.S.C.C.A.N. Vol. 3, p. 1895 (1982). In rewording the statute to its present form, the House Report notes that "shall" is used in the "mandatory and imperative sense." *Id.* at p. 1896.

[6] The GAO decision is also in conflict with the Treasury Department's interpretation of 31 U.S.C. § 9306. In promulgating regulations pursuant to this statute, the Treasury Department stated: "Companies should especially note that the law prohibits the doing of business under the provisions of this act beyond the State under whose laws it was incorporated and in which its principal office is located until an agent is appointed to accept Federal process on behalf of the company ..." 31 C.F.R. § 224.2(a) (emphasis added). Similarly, Treasury Circular 570, note (d), 53 Fed. Reg. 25,052 (1988), requires that agents be appointed as required by 31 U.S.C. § 9306.

has no authority to provide a bond to the United States if it has not complied with 31 U.S.C. § 9306.

In adopting the agency position that a surety does not have to comply with 31 U.S.C. § 9306, the Eleventh Circuit did not try to reason that the requirements of the statute were unclear.[7] Rather, the Eleventh Circuit found that this statute did not have to be enforced as written because it was not important. For example, the court found that "the DOD and the GAO could reasonably conclude that the congressional interest in having agents appointed for service of process in particular states at the time bids are submitted" is not very strong. Appendix at pp. 10A-11A. Similarly, the court cited a supposed "lack of a strong public interest underlying the requirement." *Id.* at 11A.

These are not valid reasons for failing to enforce the clear requirements of a statute. Congress did not intend for a corporate surety to be able to provide a bond to the United States unless it had appointed federal process agents in the appropriate districts prior to providing the bond. The Eleventh Circuit has substituted its judgment for that of Congress, and evidently believes that it is empowered to waive compliance with this or any statute which it does not feel is important enough to be enforced.

An affirmation of the court's decision would effectively frustrate Congress' intent in passing this statute.

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[7] The GAO and the Eleventh Circuit held that the lack of compliance with 31 U.S.C. § 9306 could be cured after bid opening. Not only is this contrary to the plain terms of the statute, it is totally irrational. It is a fundamental rule of government contracting that a non-responsive bid may not be made responsive after bid opening. This would give the bidder the option to make its bid responsive after other bids are exposed and destroy the integrity of the bidding process.

If compliance with this statute can be waived or cured, corporate sureties will not go to the trouble and expense to comply with the appointment of federal process agents prior to submitting a bid bond as intended by Congress. It is well settled that an agency's construction of a statute should not be adopted by the Court where the administrative construction would "frustrate the policy that Congress sought to implement." *Curry v. Block*, 738 F.2d 1556, 1560, n.6 (11th Cir. 1984), *citing Federal Election Commission v. Democratic Senatorial Campaign Commission*, 454 U.S. 27, 37, 102 S.Ct. 38, 44 70 L. Ed.2d 23 (1981).

More importantly, this Court cannot sanction the Court of Appeals cavalier approach in disregarding the clear requirements of this statute. The courts cannot selectively enforce statutes based on their own view or an agency's view of their importance. In order to preserve fairness, and the perception of fairness, there must be certainty in the competitive bidding process and uniform enforcement of procurement statutes and regulations. If the provisions of a statute are clear, they must be enforced. Bidders cannot be left guessing which procurement statutes will be deemed important enough to enforce and which are unimportant enough to disregard.

CONCLUSION

For all of the above reasons, Stay, Inc. respectfully requests that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX TO

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December 3, 1991

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-3849

Stay, Inc.,
Appellant
v.

Richard B. Cheney, et al.,
Appellees

Judgment Dated September 4, 1991

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and COX, Circuit Judges, and ENGEL*, Senior Circuit Judge.

ENGEL, Senior Circuit Judge:

This case addresses the validity of a bid for a government contract where the bid contains a technical defect. This court has previously addressed similar issues in *Shoals American Indus., Inc. v. United States*, 877 F.2d 883 (11th Cir. 1989) (deferring to government agency's determination that bid was unacceptable), and *Choctaw Mfg. Co. v. United States*, 761 F.2d 609 (11th Cir. 1985) (reversing government agency's decision to accept a defective bid). Here, the successful bidder failed to comply with a rule requiring appointment of process agents by its bonding company before opening of the bids. We hold that because the bonding company appeared on the Treasury Department's list of approved sureties, the district court

* Honorable Albert J. Engel, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

properly deferred to the government agency's decision to accept the bid, particularly where the technical defect was cured shortly after the bid was accepted.

The plaintiff-appellant, Stay, Inc. ("Stay"), is in the business of providing security guards for hire. Stay was an unsuccessful bidder for a contract with the Department of Defense ("DOD") to provide security services at the Army Material Command Building in Alexandria, Virginia. The DOD awarded the contract to American Mutual Protective Bureau ("AMPB") in November 1989.

Stay sought injunctive and declaratory relief, arguing that AMPB's bid was defective and that the contract should have been awarded to Stay. The district court granted summary judgment in favor of defendants DOD and AMPB, finding that the defects in AMPB's bid could be waived by DOD, and that these defects did not affect the validity or enforceability of the AMPB bid. We now affirm the summary judgment granted in favor of the defendants.

I.

[1] In May, 1989, the DOD issued an invitation for bids on the security services contract at the Alexandria facility. All bidders were required to submit a bond or bid guarantee with their bids in the amount of 20% of the bid price for the initial twelve-month period of the contract. A bid guarantee is a firm commitment from a bidder indicating that if its bid is accepted, it will execute the contractual documents and provide the payment and performance bonds required in the contract. Under the applicable Treasury Department regulations, the surety companies executing these 20% bonds were to be licensed in certain locations, and were to have appointed agents for service of process where the bidding company's offices were located, where the obligation was to be performed, and in

the District of Columbia. A copy of this requirement was included with the DOD's invitation for bids.

Seven firms submitted bids for the security services contract. Stay, a Florida corporation, submitted the third lowest bid, while AMPB, a California corporation, submitted the second lowest bid. The H&H Service Company submitted the lowest bid. In August 1989, Stay filed a protest with the DOD's Contracting Officer, Karen Lefman, arguing that the bids filed by H & H and by AMPB were nonresponsive because of various alleged defects. Lefman agreed with Stay's objections to the H & H bid, concluding that it contained mathematical inconsistencies and failed to provide the required financial information for its sureties. However, the DOD found the AMPB bid acceptable, and in accordance with 41 U.S.C. § 253b(c), awarded the contract to AMPB as the lowest qualified bidder.

Stay protested to the General Accounting Office ("GAO"), contending that the corporate surety which had provided AMPB's 20% bid guarantee, the Merchants Bonding Company, an Iowa corporation, was not licensed to do business in Virginia, the state where the contract was to be performed. The GAO denied Stay's protest in December 1989, concluding that Treasury Department policy only required the bonding company to be licensed in the state where the bond was executed, not where the contract was to be performed. Since the Merchants Bonding Company was licensed in California where the bond was executed, the GAO agreed with the DOD's Contracting Officer that the AMPB bid was not defective.

In its request for reconsideration filed with the GAO in January 1990, Stay added the argument that AMPB's bid was also defective because Merchants Bonding Company had not appointed agents for service of process in Virginia,

where the contract was to be performed, nor in California, where AMPB is located. Citing Treasury Circular 570, Stay argued that federal regulations required such appointment of agents for service of process before the bids were opened by the DOD. Merchants Bonding Company had appointed agents for service of process in the District of Columbia before the bids were opened in June 1989, but had not appointed agents in Virginia or California before that date. In February 1990, the GAO concluded that these procedural omissions did not render the AMPB bid defective.

Stay then sought injunctive and declaratory relief in the U. S. District Court for the Middle District of Florida. In July 1990, the district judge concluded that GAO's approval of the AMPB bid was not arbitrary or capricious, and that even if the failure to appoint agents for service of process was a "technical violation of the law", Stay was not prejudiced by this omission. (Order Granting Summary Judgment, 7/13/90, at 6). Stay's requested relief was denied, and summary judgment granted in favor of the defendants. Stay has appealed the decision on the appointment of agents for service of process, but does not challenge the DOD's or GAO's decision on the failure of AMPB's surety to obtain a Virginia license.

II.

[2] We note as a preliminary matter that the GAO's authority in this case arises under the Federal Property and Administrative Services Act of 1949, Ch. 288, 63 Stat. 377 (now codified as amended in various sections of the U.S. Code). This statute provides the GAO with the authority to administer federal government property and to contract with private companies. 40 U.S.C. § 481. The Act further authorizes the Administrator of the GAO to delegate specific functions to other executive agencies, 40 U.S.C. § 486, and to employ personnel for the protection of federal

property, 40 U.S.C. § 490. By specific delegation dated September 23, 1987, the responsibility for the provision of security guard services at the Army Material Building in Alexandria, Virginia was delegated to the DOD.[1]

[3-5] An economically interested party may protest to the GAO the proposed awarding of a government contract. 31 U.S.C §§ 3551-3556; 4 C.F.R. § 21.1(a). Any interested party is also entitled to seek reconsideration of the GAO's decision, as Stay did here. 4 C.F.R. § 21.12. Stay's action for relief in the district court arises under federal law as prescribed in the jurisdictional statute codified at 28 U.S.C. § 1331, and Stay's legal standing to appeal the GAO's decision lies in those portions of the Administrative Procedure Act codified at 5 U.S.C. §§ 701-706. The latter statute states that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. As a disappointed bidder on the contract, Stay clearly had standing to challenge the awarding of the contract to AMPB. See *Choctaw Mfg. Co. v. United States*, 761 F.2d 609, 616 (11th Cir. 1985); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C.Cir. 1970).

[6,7] The district court's legal conclusions are subject to de novo review. *Brown v. Crawford*, 906 F.2d 667, 669 (11th Cir. 1990). In reviewing a district court's decision to grant summary judgment, this court must apply the same

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[1] Without suggesting our result would be any different, we disagree with the appellant's contention that the Armed Services Procurement Act, 10 U.S.C. § 2301 *et seq.*, governed the letting of this contract for security guard services. In any event, the distinctions between the Armed Services Procurement act and the Federal Property and Administrative Services Act do not appear to be relevant to the facts of this case.

legal standards that bound the district court. *Earley v. Champion Intern. Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990).

Under the applicable regulation, a copy of which was included in the DOD's invitation for bids on the contract at issue here, the surety companies supplying the 20% bid guarantees were to have appointed agents for service of process as follows:

> (1) In the district where the principal resides; (2) in the district where the obligation is to be undertaken and performed; and (3) also in the District of Columbia where the bond is returnable and filed.

31 C.F.R. § 224.2. *See also* Note (d) of Treasury Circular 570, 55 Fed.Reg. 27,332 (7/2/90). This Treasury Department regulation is promulgated under authority of 31 U.S.C. § 9306.

The parties to this case agree that AMPB's bid failed to fully comply with this rule because AMPB's surety did not appoint process agents in California or Virginia before the bids were opened or before AMPB's bid was accepted. AMPB has now apparently complied with the requirements of the regulations, but Stay argues that at the time of submission, the AMPB bid was nonresponsive and should have been rejected. It is undisputed that AMPB's surety company, the Merchants Bonding Company, has at all relevant times appeared on the Treasury Department's list of approved sureties, and has been approved for and agrees to be obligated for the full amount of the bond in the event AMPB fails to honor its bid.

This court has established that a disappointed bidder who wishes to challenge a government contracting officer's decision awarding a contract to another party:

> bear[s] a heavy burden of showing either that (1) the procurement official's decisions on matters committed primarily to his own discretion had no rational basis, or (2) the procurement procedure involved a clear and prejudicial violation of applicable statutes or regulations.

Choctaw Mfg. Co. v. United States, 761 F.2d 609, 616 (11th Cir. 1985) (quotations omitted).

[8] Stay's challenge to the contracting officer's decision arises under the second prong of the *Choctaw* test. In discussing this standard, our court has recently held that a procurement officer and the GAO are entitled to considerable deference when they interpret the statutes and regulations which they administer. *Shoals American Indus. Inc. v. United States*, 877 F.2d 883, 888 (11th Cir. 1989). "Such deference is particularly appropriate in the procurement areas, as there is a 'strong public interest in avoiding disruptions in procurement, and for withholding judicial interjection unless it clearly appears that the case calls for an assertion of an overriding public interest...'" *Shoals*, 877 F.2d at 888 (emphasis in original)(quotations omitted).

In *Shoals*, the unsuccessful bidder alleged that the Navy and GAO improperly determined its bid to be incomplete and on an improper form. This court upheld the Navy's and GAO's rejection of the bid.

> The question whether the irregularity in Shoals' bid is "minor" or "material," then, is largely one of policy. As such, it is one upon which the district court should have deferred to the Navy and GAO. Put another way, Shoals failed to show that the Navy's decision to award the contract to Bertolini involved a "*clear*...violation of applicable statutes or regulations."

877 F.2d at 889 (emphasis in original) (quotation omitted).

[9] The GAO's opinion issued in response to Stay's protest indicates that the agency does not view the failure of a successful bidder's surety to appoint process agents before the bids are opened to be a material defect:

> First, the requirement to appoint federal process agents in certain districts does not bear directly on the authority of the surety to issue a bond, as do the other limitations in the [Treasury] Circular [570], such as a surety's inability to provide a valid bid bond in excess of its underwriting limitation, or to execute a bond in states where it does not hold a surety license. Further and more importantly, an approved surety's failure to appoint federal process agents does not alter that surety's obligation under an otherwise valid bid bond: such a surety cannot renounce its obligation, and cannot refuse to honor its contractual commitment. Accordingly, in our view, non-compliance with this requirement constitutes a procedural omission that does not render the bond defective and can be corrected after bid opening, as AMPB's surety has done here.

Stay, Inc., 69 Comp. Gen. 251, B-237073.2, 90-1 CPD ¶ 225 (2/26/90).

We find the GAO's analysis convincing. The requirement that surety companies appoint agents for service of process is undoubtedly designed to protect the government should the need to collect on the guarantee arise. While the government would then surely benefit from the opportunity to serve process on the bonding company in any of three jurisdictions, the GAO could reasonably interpret the law as only requiring appointment

of process agents by the successful bidder's surety company after the bids have been opened.

[10] In the past, the GAO has held that the contracting officer must verify that a bid bond is valid on its face. Facial validity is shown when the guarantee has been property executed by the surety's agent, the surety has been approved for and has agreed to be obligated of the full amount of the bond, and the surety appears on the Treasury Circular 570 list of approved sureties. *See Siska Constr. Co., Inc.*, B-218428, 85-1 CPD ¶ 669 (6/11/85), *aff'd*, B-218428.2, 85-2 CPD ¶ 102 (7/29/85). DOD's Contracting Officer did verify the facial validity of the Merchants Bonding Company guarantee before accepting the AMPB bid. Merchants Bonding Company was listed as an approved surety on the Treasury Circular 570, and the amount of its properly executed guarantee did not exceed its approved underwriting limitations.

Any further verification of the guarantee's validity could reasonably be left until after the opening and acceptance of the bid. The failure of Merchants Bonding Company to appoint process agents in California and Virginia until after AMPB's bid was accepted by the DOD did not affect the bonding company's underlying obligation. "In a proceeding against a surety corporation providing a surety bond [for obligations owed to the federal government] ... the corporation may not deny its power to provide a surety bond to assume liability." 31 U.S.C. § 9307.

Stay correctly notes that the GAO has in the past refused to waive other bid defects which, like the failure to appoint process agents, would not have affected the underlying obligation of the bidder or the enforceability of the guarantee. *See Midwest Asbestos Removal Service, Inc.*, B-2333109, 88-2 CPD ¶ 473 (11/10/88) (bid unacceptable when surety company did not appear on Treasury

Department's list of approved sureties). Yet we cannot say that the DOD's and GAO's decision to waive strict compliance with the process agent requirement in this case has frustrated Congress' intent or is lacking in reason. The GAO could reasonably conclude that omission of a surety company from the approved list might reflect some underlying financial problem with the surety, whereas the failure to appoint three process agents before acceptance of the bid would not jeopardize the government's ability to enforce the guarantee.

Certainly the extent of judicial deference in the awarding of government contracts is not without limit. In *Choctaw Mfg. Co. v. United States*, 761 F.2d 609 (11th Cir. 1985), this court held that a bidder for a Small Business Act set-aside contract which was not in fact a "small business" could not receive the contract, and the DOD had improperly ignored the statutory requirements. "There is no question that a district court may '[e]njoin the performance of a [government] contract if the award was the result of procedures not comporting with the law.'" *Choctaw*, 761 F.2d at 619 (quotation omitted). The *Choctaw* court found that the contracting officer had "clearly violated the applicable procurement regulations; ... [T]he interest of the public, and those who bid for the agency's work, in the agency's compliance with the law outweighs the higher price the government will have to pay for the procurement." *Id.*, 761 F.2d at 621.

Clearly the requirement for appointment of process agents differs significantly from the issue of small business set-asides however. While in *Choctaw* there was a clear congressional interest in promoting small businesses which the DOD had improperly ignored, here the DOD and GAO could reasonably concluded that the congressional interest in having agents appointed for service of process in particular states at the time bids are submitted is not nearly

so strong. The rule is designed for the government's protection, so that if the government has to collect on the bonds, the legal proceedings can go smoothly. However, unlike a large business, which cannot suddenly become a small business if it is awarded a contract earmarked for small businesses, AMPB's surety company could and *did* register agents for service of process in Virginia and California once AMPB was awarded the contract in Alexandria. The DOD's conclusion that this technical defect could be remedied after acceptance of the bid was reasonable, and did not represent a clear and prejudicial violation of the applicable statute or regulations.

The requirement that surety companies appoint process agents reflects Congress' and the Treasury Department's interest in quickly and easily enforcing bid guarantees. Certainly if in the future the GAO elects to enforce the requirement more rigidly, today's decision should not serve as the basis for an argument that lax compliance is acceptable. We simply find that given the deferential standard of review, the lack of a strong public interest underlying the requirement, and the easily correctable nature of the defect in AMPB's bid, the DOD's and GAO's actions were not arbitrary or capricious in the context of this case, and represent reasonable interpretations of the law.

The summary judgment in favor of defendants Cheney, Lefman and AMPB is AFFIRMED.

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

CASE NO. 90-155-CIV-J-16

Stay, Inc.,
Plaintiff
v.

Richard B. Cheney, et al.,
Defendants
and

American Mutual Protective Bureau,
Intervenor-Defendant

Order Dated July 13, 1990

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND DEFENDANT-INTERVENOR

This matter is before the Court on cross-motions for summary judgment, the parties agreeing that there are no material facts in dispute and that resolution of this cause turns on issues of law. After review of the entire record and the applicable case law, the Court concludes that summary judgment should be granted in favor of the defendants, RICHARD B. CHENEY, Secretary of Defense, and KAREN A. LEFMAN, Contracting Officer, and defendant-intervenor, AMERICAN MUTUAL PROTECTIVE BUREAU.

Procedural Background

The plaintiff, STAY, INC., a disappointed bidder for a contract for the provision of security guard services at the Army Material Command Building (AMCB) in Alexandria,

Virginia, filed this action for declaratory and injunctive relief on February 27, 1990. Simultaneously, STAY filed a motion for temporary restraining order and preliminary injunction. On February 28, 1990, the Court entered a Temporary Restraining Order, which took effect upon the posting by plaintiff of a $100,000 bond, enjoining the defendants from implementing a contract for guard services at the AMCB awarded to American Mutual Protective Bureau (AMPB) pursuant to Invitation for Bids MDA946-89-C-0041, until further order of Court, and setting down a hearing for March 9, 1990, on the motion for preliminary injunction. At that hearing the Court first granted the motion of AMPB to intervene as a defendant pursuant to Fed.R.Civ.P. 24(a). After hearing the arguments of counsel, the Court found that the plaintiff had failed to carry its burden of showing a substantial likelihood of success on the merits, and therefore denied preliminary injunctive relief and lifted the temporary restraining order. The Court also partially granted a verbal motion by plaintiff for a refund of the cash bond which had been posted, reducing the amount of the bond to $40,000. Additionally, because the parties agreed that there were no material facts in dispute, the Court set certain time limits for the filing of motions and responses so that this case could be expeditiously resolved. This case is now ripe for decision. Accordingly, the Court hereby makes the following findings of fact and conclusions of law.

Findings of Fact

The following facts are not in dispute and are established by the administrative record before the Court. On May 18, 1989, the Department of Defense (DOD), Real Estate and Facilities Directorate, Washington Headquarters Services, issued Invitation for Bids (IFB) MDA 946-89-C-0041, a 100 percent small business set aside, requesting bids on the providing of security guard

services at the AMCB. The IFB solicitation required offerors to submit bid guarantees in conjunction with the offer, and provided a copy of Standard Form 24, "Bid Bond," which contained the following language:

> 4(a) Corporations executing the bond as sureties must be among those appearing on the Treasury Department's list of approved sureties and must be acting within the limitations set forth therein.

Treasury Department Circular 570, published int he Federal Register, Volume 54, No. 126, June 30, 1989, at 27829, contains the following notes:

> (c) A surety company must be licensed in the State or other area in which it proves a bond, but need not be licensed in the State or other area in which the principal resides or where the contract is to be performed (28 Op.Atty.Gen. 127, Dec. 24, 1909; 31 CFR 223.5(b)). The term "other area" includes the District of Columbia, American Samoa, Guam, Puerto Rico, and the Virgin Islands.
>
> (d) FEDERAL PROCESS AGENTS:Treasury approved surety companies are required to appoint Federal process agents in accord with 31 U.S.C. 9306 and 31 CFR 224 in the following districts: Where the principal resides; where the obligation is to be performed; and in the District of Columbia where the bond is returnable or filed.

The day of the bid opening, June 20, 1989, seven firms submitted bids. STAY submitted the third lowest bid, AMPB submitted the second lowest bid, and H & H Service Corporation (H & H) submitted the lowest bid. On August 21, 1989, STAY protested to the contracting officer (CO) that the bids submitted by both H & H and AMPB were nonresponsive because of alleged bid bond deficiencies.

The contracting officer sustained the protest as it related to H & H, but denied it as to AMPB by a letter decision of September 12, 1989, because the corporation executing AMPB's bond as surety appeared on the Treasury Department's list of approved sureties.

STAY then protested to the General Accounting Office (GAO) on September 22, 1989, challenging the bid bond submitted by AMPB. STAY argued that the corporate surety used by AMPB, Merchants Bonding Company, was improper because it was not licenses to do business in Virginia where the contract was to be performed, thereby rendering AMPB's bid nonresponsive. The GAO issued its decision December 22, 1989, denying the protest. The GAO determined that the CO's decision was appropriate since the Treasury Circular permits acceptance of bid bonds executed by corporate sureties not listed as licensed in the jurisdiction where the contract is to be performed so long as the surety is licensed in the jurisdiction where the bond is executed.[1] STAY then filed a request for reconsideration on January 19, 1990, asserting that AMPB's bid was nonresponsive because its corporate surety had failed to comply with the requirement that federal process agents be appointed where the contract is to be performed and where the principal resides. The GAO denied this request on February 26, 1990, ruling that the failure to name federal process agents is a procedural defect which does not bear on the authority of the surety to issue

[1] The GAO expressly refused to consider Stay's argument that the treasury Circular itself improperly permits acceptance of bid bonds executed by corporate sureties not licensed in the state where a contract is to be performed on two grounds. First, the GAO ruled the argument untimely because under the appropriate bid regulation, 4 C.F.R. § 21.2(a)(1)(1989), any alleged solicitation improprieties apparent on the face of the solicitation had to be filed prior to bid opening, and Stay had failed to timely protest. Second, the GAO concluded that its consideration of the matter would be inappropriate as the issue was one for either the Treasury Department or the courts to decide.

the bond or affect the underlying obligation. In support of this conclusion, the GAO opined:

> First, the requirement to appoint federal process agents in certain districts does not bear directly on the authority of the surety to issue a bond, as do the other limitations in the Circular, such as a surety's inability to provide a valid bid bond in excess of its underwriting limitation, or to execute a bond in states here it does not hold a surety license. Further, and more importantly, an approved surety's failure to appoint federal process agents does not alter that surety's obligation under an otherwise valid bid bond: such a surety cannot renounce its obligation, and cannot refuse to honor its contractual commitment. Accordingly, in our view, noncompliance with this requirement constitutes a procedural omission that does not render the bid bond defective and can be corrected after bid opening, as AMPB's surety has done here.

On February 27, 1990, plaintiff filed this suite to enjoin AMPB's performance which was scheduled to begin March 1, 1990. With these facts in mind the Court turns to a consideration of the applicable law.

Conclusions of Law

The Administrative Procedure Act (ABC), 5 U.S.C. §§ 701-706, sets forth the relevant standard to be exercised by a court when reviewing a government contract decision. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). The statute allows a court's interference with agency action only if that action is found to be "arbitrary, capricious and abuse of discretion, or otherwise not in accordance with law." Accordingly, a court's function is rather circumscribed, and it is inappropriate for the court to substitute its judgment for that of the agency. *Citizens to*

Preserve Overton Park v. Volpe, 401 U.S. 402, 416; 91 S.Ct. 814, 824 (1971). The Eleventh Circuit Court of Appeals has ruled that a procurement decision should not be overturned unless the aggrieved bidder carries its burden of proving that there was no rational basis for the agency's decision, or that the procurement decision involved a clear and prejudicial violation of applicable statutes or regulations. *Choctaw Mfg. Co. v. United States*, 761 F.2d 609, 616 (11th Cir. 1985). In this case, the CO's procurement decision is supported by a decision of the GAO which, although subject to some degree of judicial review, is entitled to considerable deference. *Shoals American Industries, Inc. v. United States*, 877 F.2d 883 (11th Cir. 1989).

After a review of the administrative record, this Court cannot conclude that the CO's procurement decision in this case was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." The GAO ruled that the CO's action in awarding the contract to AMPB was appropriate because the responsiveness of the bid was to be determined by looking to see if the bid as submitted was an offer to perform without exception the exact thing called for in the bid invitation, acceptance of which would bind the contractor to perform. The CO determined that the bid bond itself was responsive on its face because the corporate surety appeared on the Treasury Department Circular 570 list of acceptable sureties. Since AMPB's offer was fully responsive, the CO concluded that STAY's challenge to AMPB's bid lacked merit. The GAO affirmed this decision.

As to the failure of AMPB's corporate surety to properly designate federal process agents, the GAO determined that it did not affect the surety's binding obligation under the bond, and thus was a procedural defect. The GAO's rationale has been discussed earlier in this Order. In the Court's opinion, the GAO's decision has

a rational basis. Furthermore, even if the sureties' failure to designate is a technical violation of the law, STAY has failed to demonstrate any prejudice to it. Indeed, if any prejudice were present as a result of the failure to appoint federal process agents in the appropriate districts, it would run to the United States and its ability to enforce the bond, not to the plaintiff.

Finally, as set out in footnote 1 of this Order, the GAO refused to entertain STAY's argument that the Treasury Circular itself improperly permits acceptance of bid bonds executed by corporate sureties not licensed in the state where the contract is to be performed. The GAO ruled that the Treasury Department's determination of the acceptability of corporate sureties was not an appropriate subject for it to broach. The Treasury Department regulates Corporate Sureties pursuant to an Act of Congress. 31 U.S.C. §§ 9301-9309; *see American Druggists Ins. Co. v. Bogart*, 707 F.2d 1229, 1232 (11th Cir. 1983). As the Court understands plaintiff's argument in this case, it is that the GAO's refusal to consider this argument, and thus the denial of STAY's protest, was arbitrary, capricious and contrary to law.

This argument must fail. The Treasury Department has its own procedures which spell out the responsibilities of the Secretary of the Treasury for ensuring compliance of bond companies with federal law. 31 C.F.R. § 223.17. It is not, and should not be, the role of the CO to delve past facial validity of a bond when the bonding company appears on Treasury Circular 570. The very purpose of such a circular is to assure the CO that the bonding company is in compliance with federal law, and indicates that whatever background check might be required has previously been conducted by the Treasury Department. Expecting the CO to go beyond the Treasury Circular, as STAY would have this Court rule, would be an unreasonable burden on the

procurement officer. These concerns prompted the GAO's determination that it was an inappropriate ground for protest consideration. The Court concludes that this determination was entirely correct. If GAO were to begin analyzing whether the CO should check the compliance of bids with every applicable federal statute it would open up the proverbial "can of worms." Accordingly, the GAO's decision not to decide this issue was absolutely proper, rational, and not contrary to applicable law.

For the foregoing reasons, it is now

ORDERED AND ADJUDGED:

1. That the defendants' motion for summary judgment, filed herein on March 8, 1990, is **GRANTED**, and the clerk is hereby directed to enter judgment in favor of defendants, RICHARD B. CHENEY, Secretary of Defense, and KAREN A. LEFMAN, Contracting Officer, and defendant-intervenor, AMERICAN MUTUAL PROTECTIVE BUREAU, and against plaintiff, STAY, INC.

2. That any claim for damages resulting from the entrance of the Temporary Restraining Order by the Court be made within twenty (20) days of the date of this Order; otherwise, the remaining $40,000 posted with the Clerk of the Court and on deposit in the Court's registry, will be automatically released to the plaintiff, STAY, INC.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 13 day of July, 1990.

Signed: John H. Moore II, United States District Judge

DECISION OF THE

COMPTROLLER GENERAL OF THE UNITED STATES

In the Matter of: Stay, Inc.

File: B-237073.2

Date: February 26, 1990

DIGEST

Protest that bid bond was defective due to corporate surety's failure to name federal process agents is denied because such failure is a procedural omission that does not bear directly on the authority of the surety to issue the bond or affect the underlying obligation of the surety.

DECISION

Stay, Inc., protests the award of a contract by the Real Estate and Facilities Directorate, Washington Headquarters Services (WHS), Department of Defense, to American Mutual Protective Bureau (AMPB) under invitation for bids (IFB) No. MDA946-89-C-0041, for security guard services at the Army Materiel Command Building in Alexandria, Virginia.

We deny the protest.

Stay initially protested the award to AMPB on the ground that WHS improperly accepted AMPB's bid bond because AMPB's surety, Merchants Bonding Company, was not listed in Treasury Circular 570 as licensed in Virginia, the state where the contract is to be performed. Treasury Circular 570, published annually, is the Treasury Department's list of sureties approved to provide bonds to the government. We denied the protest because the Treasury Circular, on its fact, states that a surety need not

be licensed in the state of contract performance. Accordingly, we held that the contracting officer acted appropriately in accepting AMPB's otherwise properly executed bid bond. *Stay, Inc.*, B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586. Stay also argued that to the extent Treasury Circular 570 permitted acceptance of bonds from sureties not licensed in the state where the contract is to be performed, the Treasury Circular itself is improper. We declined to consider this issue as it is a matter for the Treasury Department or the courts, not our Office, to resolve.

Stay now raises an additional basis for challenging award to AMPB, contending that AMPB's bid bond was defective because Merchants Bonding Company had not appointed federal process agents as required by Treasury Circular 570.[1] According to Stay, failure to appoint federal process agents in the districts where required by the time of bid opening renders the bid bond defective and the bid nonresponsive. We do not agree.

The Secretary of the Treasury is required by statute to authorize corporations to provide surety bonds to the government. See 31 U.S.C. §§ 9304-9308 (1982). Companies so authorized are included on a list published annually in Treasury Circular 570. 31 C.F.R. § 223.16 (1989). Corporations providing bid bonds to the government must appear on this list of approved sureties, and must operate within the limits set forth therein. Federal Acquisition Regulation (FAR) § 28.202-1(a).

One of the requirements set forth in Treasury Circular 570, as well as in statute and regulation, is that sureties providing

[1] Although Stay characterizes its current challenge to the award to AMPB as a request for reconsideration of our prior decision, it in fact constitutes a new protest, since Stay does not challenge the rationale on which our prior decision is based and instead raises a new ground of objection to the award.

bonds to the government must appoint federal process agents in certain districts. Specifically, this requirement, found at note (d) at the end of the Treasury Circular, states in relevant part:

> FEDERAL PROCESS AGENTS:Treasury approved surety companies are required to appoint Federal process agents in accord with 31 U.S.C. 9306 and 31 CFR 224 in the following districts: Where the principal resides; where the obligation is to be performed; and in the District of Columbia where the bond is returnable or filed.
> ...

The bid guarantee required by the IFB in this case was to be executed on Standard Form (SF) 24, Bid Bond. *See* FAR § 53.301-24. As explained in our prior decision, the instructions for completing SF 24, printed on the face of the form, provide that "[c]orporations executing the bond as sureties must be among those appearing on the Treasury Department's list of aproved sureties and must be acting within the limits set forth therein." (Emphasis added.) Stay argues that noncompliance with the requirement to appoint federal process agents in the required districts -- *i.e.*, where the contract is to be performed, where the principal resides, and the District of Columbia -- constitutes failure to act within the limits set forth in the Treasury Circular, and renders a bid bond defective. Specifically, Stay contends that since AMPB's surety failed to appoint federal process agents in Virginia (where the contract is to be performed), California (where AMPB resides), and the District of Columbia, the bid bond was defective and AMPB's bid should have been rejected.

A bid guarantee is a firm commitment from a bidder that if its bid is accepted it will execute the contractual documents and provide the payment and performance bonds required

in the contract. *See* FAR § 28.101. Its purpose is to secure the surety's liability in the event the bidder fails to honor its bid in these respects. *Leeth Constr., Ltd.*, B-236275, Nov. 13, 1989, 69 Comp. Gen. __, 89-2 CPD ¶ 454. Thus, we have repeatedly held that a bid bond is defective, rendering a bid nonresponsive, if it is not clear that the bond will bind the surety. *All Star Maintenance, Inc.*, B-234820, Mar. 24, 1989, 89-1 CPD ¶ 305. On the other hand, when a required bid bond is found to be proper on its face, the bond is acceptable. *Contract Servs. Co., Inc.*, B-226780.3, Sept. 17, 1987, 87-2 CPD ¶ 263. Specifically, where a corporate surety is designated, a bid bond is proper "on its face" when it has been duly executed by the surety's agent, the surety has agreed to be obligated for the penal amount of the bond, and the surety appears on the Treasury Circular list of acceptable sureties. *See Siska Constr. Co., Inc.* B-218428, June 11, 1985, 85-1 CPD ¶ 669, *aff'd*, B-218428.2, July 29, 1985, 85-2 CPD ¶ 102.

Given the above requirements, upon receiving a bid accompanied by a bid bond from a corporate surety a contracting officer must first determine whether the surety is obligated to the government for the amount of the bond. This obligation must be clear from the face of the bond -- *i.e.*, the instrument itself must create the necessary and intended obligation. The contracting officer must then ascertain that the surety is authorized to provide bonds to the federal government, and that the surety is acting within the limites of that authorization.

In this case, Treasury Circular 570 contained the following entry for Merchants Bonding Company:

> Merchants Bonding Company (Mutual). BUSINESS ADDRESS: 2100 Grand Avenue, Des Moines, IA. 50312. UNDERWRITING LIMITATION b/: $480,000. SURETY

LICENSES c/: AZ, CA, CO, FL, IA, KS, MI, MN, MO NE, NV, NM, OK, PA, TX, WA. INCORPORATED IN: Iowa.

After determining that the bid bond itself was properly executed, the contracting officer then reviewed the authority of the proposed surety to provide bonds to the government. Using the information in the Treasury Circular entry set forth above, the contracting officer determined that Merchants Bonding Company had been approved by Treasury to issue bonds, that it had not exceeded its underwriting limit established in the Circular, and that it was licensed as a surety in the states in which it was required to be licensed. Thus, the contracting officer concluded that the bid bond was properly executed and was submitted by an approved corporate surety acting within the limits set forth in treasury Circular 570.

Stay contends that the contracting officer must go further and also ascertain whether a corporate surety has complied with the requirement to appoint federal process agents. According to Stay, this requirement is another limitation on the authority of corporate sureties, much like the limit established on the maximum dollar amount for which a corporate surety may provide a bond. We do not agree that a surety's failure to comply with the requirement for appointment of federal process agents in certain districts renders the bond defective.

First, the requirement to appoint federal process agents in certain districts does not bear directly on the authority of the surety to issue a bond, as do the other limitations in the Circular, such as a surety's inability to provide a valid bid bond in excess of its underwriting limitation, or to execute a bond in states where it does not hold a surety license. Further, and more importantly, an approved surety's failure to appoint federal process agents does not alter that surety's

obligation under an otherwise valid bid bond: such a surety cannot renounce its obligaiton, and cannot refuse to honor its contractual commitment. Accordingly, in our view, noncompliance with this requirement constitutes a procedural omission that does not render the bid bond defective and can be corrected after bid opening, as AMPB's surety has done here.

In addition, Stay's position would create an inappropriate role for the contracting officer in reviewing the acceptability of corporate sureties. We have long recognized that the Treasury Department has a statutory mandate to oversee approval of corporate sureties. See 52 Comp. Gen. 184 (1972). In fulfilling its statutory mandate, Treasury routinely reviews detailed information about corporate sureties; after making an initial determination of acceptability, Treasury includes the surety on its published list of approved sureties, Treasury Circular 570. Contracting officials are able to review the face of the bid bond and compare the particulars of the bond with the limits set forth in the Treasury Circular. Requiring contracting officials to look beyond the face of the bond and the information provided in the Treasury Circular defeats the purpose of compiling and distributing the Circular: to provide contracting officials with a tool for ascertaining the authority of corporate sureties. The Treasury Department is charged with granting such authority and with ensuring ongoing compliance with the applicable statutes and regulations. We do not think it is appropriate to shift that responsibility to contracting officers.

We therefore continue to view the award to AMPB as proper and deny this protest. However, we have, by separate letter, forwarded a copy of this decision to the Secretary of the Treasury for whatever review deemed appropriate.

The protest is denied.

Signed: James F. Hinchman, General Counsel